

**Sarawak Securities Sdn Bhd v
William Leong Wai Ling & Ors**

HIGH COURT (KUCHING) — SUIT NO 22-183-1999-III(I)
IAN CHIN J
10 OCTOBER 2001

Civil Procedure — Amendment — Addition of new cause of action — Amendment to counterclaim — Whether statute barred — Whether amendment related back to date of counterclaim or date of writ — Distinct and separate cause of action introduced, whether also statute barred — Publication of libel after commencement of counterclaim, whether cause of action for libel could be added into counterclaim

The writ was taken out by Sarawak Securities Sdn Bhd on 22 September 1999 and after the amendment was served on the fifth defendant on 7 June 2000. On 30 June 2000, the fifth defendant filed his defence and counterclaim, which he amended on 27 July 2000 to include a claim for slander alleged to have been uttered on 15 June 1999. On 2 October 2000, the plaintiff took out an application to strike out the amendment that introduced the action of slander on the ground that it was time barred, to which counsel for the fifth defendant argued that it was not, on the ground that the amendment that resulted in the claim took effect from the date of the writ, which was 22 September 1999 and thus the action was within the one year period. The fifth defendant subsequently applied for leave to amend to include a claim for libel on 17 October 2000. The application to amend was dismissed and the plaintiff's application to strike out the counterclaim based on the slander was allowed. The appeals were in respect of the two decisions.

Held, dismissing the appeal with costs to the plaintiff here and below:

- (1) As to whether the slander was statute barred, common sense dictates that the only date that can be reckoned would be the date when the counterclaim came into existence, since only by the counterclaim can the fifth defendant be said to have filed an action against the plaintiff, as otherwise it would amount to saying that the fifth defendant had launched his counterclaim on 7 June when in fact he had not. In the event of an amendment to the counterclaim, the amendment is read back to the date of the counterclaim (*Tilcon Ltd v Land and Real Estate Investments Ltd* [1987] 1 All ER 615). Therefore, the date of 30 June 2000 was the determining date and this meant the action of slander was time barred having been commenced more than one year after the slander was uttered on 15 June 1999 (see p 298A-C).
- (2) The proposed amendment sought to introduce a new cause of action, which was libel. Therefore, it was an entirely separate cause of action and distinct from that of slander. Therefore, the proposed amendment did nothing to help the cause of action

- A based on slander which was statute barred and therefore correctly struck out (see p 299C–D).
- (3) As for the new cause of action which the proposed amendment sought to introduce, it was relevant to determine when the cause of action arose, that was when exactly was this subsequent publication after the slander was uttered on 15 June 1999. The proposed pleading was vague, though it did mention that the publication continued to at least August 2000. The counterclaim was commenced on 30 June 2000, and therefore it could not include a cause of action that was not in existence at that time. The publication relied on clearly occurred after the commencement of the counterclaim and could not therefore be included in the counterclaim. The deputy registrar was right in disallowing the application to amend (see p 299D–G).
- B
- C

[Bahasa Malaysia summary]

- D Writ tersebut telah dikeluarkan oleh Sarawak Securities Sdn Bhd pada 22 September 1999 dan selepas pindaan telah disampaikan ke atas defendan kelima pada 7 Jun 2000. Pada 30 Jun 2000, defendan kelima telah memfailkan pembelaan dan tuntutan balas beliau, yang telah beliau pinda pada 27 Julai 2000 untuk memasukkan satu tuntutan slander yang didakwa telah disebut pada 15 Jun 1999. Pada 2 Oktober 2000, plaintif telah mengeluarkan satu permohonan untuk membatalkan pindaan yang memperkenalkan tindakan slander tersebut atas alasan bahawa ia dihalang oleh masa tetapi peguam bagi pihak defendan kelima berhujah bahawa ia tidak, atas alasan bahawa pindaan yang menyebabkan tuntutan tersebut berkuatkuasa daripada tarikh writ tersebut, iaitu 22 September 1999 dan oleh itu tindakan tersebut adalah di dalam lingkungan tempoh masa satu tahun. Defendan kelima berikutan itu memohon untuk kebenaran meminda untuk memasukkan satu tuntutan bagi libel pada 17 Oktober 2000. Permohonan untuk meminda telah ditolak dan permohonan plaintif untuk membatalkan tuntutan balas berdasarkan slander telah dibenarkan. Rayuan-rayuan tersebut adalah berhubung dengan dua keputusan ini.
- E
- F
- G

Diputuskan, menolak rayuan tersebut dengan kos kepada plaintif di mahkamah ini dan mahkamah bawahan:

- H (1) Berhubung dengan sama ada slander tersebut adalah dihalang oleh statut, pemikiran yang waras menyatakan bahawa satu-satunya tarikh yang boleh dikira adalah tarikh bila tuntutan balas tersebut mula wujud, kerana hanya melalui tuntutan balas tersebut defendan kelima boleh dikatakan telah memfailkan suatu tindakan terhadap plaintif, jika sebaliknya, defendan kelima akan dianggap telah memulakan tuntutan balasnya pada 7 Jun sedangkan pada hakikatnya ini tidak dilakukan. Sekiranya berlaku
- I

suatu pindaan kepada tuntutan balas tersebut, pindaan tersebut akan dibaca menurut tarikh tuntutan balas tersebut (*Tilcon Ltd v Land and Real Estate Investments Ltd* [1987] 1 All ER 615). Oleh itu, tarikh 30 Jun 2000 adalah tarikh penentu dan ini bermakna bahawa tindakan slander telah dihalang oleh masa kerana telah dimulakan lebih dari satu tahun selepas slander disebut pada 15 Jun 1999 (lihat ms 298A–C).

- (2) Pindaan yang dicadangkan itu cuba untuk memperkenalkan satu kausa tindakan yang baru, yang mana adalah libel. Oleh itu, ianya adalah suatu kausa tindakan yang berasingan sama sekali dan berbeza daripada slander. Oleh itu, pindaan yang dicadangkan tidak membantu kausa tindakan berdasarkan slander yang telah dihalang oleh statut dan oleh itu dengan betulnya dibatalkan (lihat ms 299C–D).
- (3) Berhubung dengan kausa tindakan baru yang cuba diperkenalkan oleh pindaan yang dicadangkan itu, ia adalah relevan untuk menentukan bila kausa tindakan tersebut berbangkit, iaitu bila berlakunya pengumuman (publication) slander yang disebut pada 15 Jun 1999 tersebut. Pliding yang dicadangkan adalah samar-samar, meskipun ia telah sesungguhnya menyebut bahawa pengumuman berterusan sehingga sekurang-kurangnya Ogos 2000. Tuntutan balas tersebut telah dimulakan pada 30 Jun 2000, maka ia tidak boleh memasukkan satu kausa tindakan yang tidak wujud ketika itu. Pengumuman yang diharapkan jelas berlaku selepas permulaan tuntutan balas dan tidak boleh dengan itu dimasukkan dalam tuntutan balas tersebut. Penolong pendaftar betul dalam tidak membenarkan permohonan untuk meminda (lihat ms 299D–G).]

Notes

For cases on addition of a new cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 422–428.

Cases referred to

Bep Akitet (Pte) v Pontiac Hotel Pte Ltd [1991] 3 MLJ 105 (refd)
Ketteman v Hansel Properties Ltd [1988] 1 All ER 38 (refd)
Koay Chiew Leong (t/a Leong & Co) v United Engineers (M) Bhd [1999] 5 MLJ 390 (refd)
Tilcon Ltd v Land & Real Estate Investments [1987] 1 All ER 615 (folld)

Legislation referred to

Limitation Act 1953 s 31
 Limitation Act [Sing] s 31
 Rules of the High Court 1980 O 20 r 5
 Rules of the Supreme Court [Sing] O 20 r 5
 Sarawak Limitation Ordinance Schedule item 11

- A** *HC Sim (Reddi & Co)* for the plaintiff.
Albert Tang (Chew Jughah Wan Ullok & Co) for the fifth defendant.

Ian Chin J: This writ was taken out by Sarawak Securities Sdn Bhd on 22 September 1999 and after the amendment was served on the fifth defendant on 7 June 2000. The fifth defendant filed his defence and counterclaim on 30 June 2000, and then amended it on 27 July 2000 to include a claim for slander alleged to have been uttered on 15 June 1999 at a hotel. This prompted the plaintiff to take out, on 2 October 2000, an application to strike out the amendment that introduced the action of slander on the ground that it is time barred, it having been commenced more than one year after the words had been spoken (see item 11 of the Sch to the Sarawak Limitation Ordinance). The fifth defendant responded by applying on 17 October 2000 for leave to amend to include a claim for libel. The application for amendment was dismissed whilst the application of the plaintiff to strike out the counterclaim based on slander was allowed. The appeals are in respect of the two decisions.

- D** Firstly, the issue is whether the slander uttered on 15 June 1999 was statute barred. Mr Albert Tang, learned counsel for the fifth defendant, argued that it was not on the ground that the amendment that resulted in this claim takes effect from the date of the writ, which is 22 September 1999, and hence, the action was well within the one year period. The court was referred to *Bep Akitek (Pte) v Pontiac Hotel Pte Ltd* [1991] 3 MLJ 105 which dealt with O 20 r 5 of the Singapore Rules of the Supreme Court, and where it was held that the court has no power to order an amendment to take effect from a date other than that provided under s 31 of the Singapore Limitation Act ('SLA'). The section says:

- F** For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

It is clear from that decision that the amendment should take effect from the date of the action because s 31 of the SLA says so. Similarly, the decision in *Koay Chiew Leong (t/a Leong & Co) v United Engineers (M) Bhd* [1999] 5 MLJ 390 was because a similar s 31 of the Malaysian Limitation Act 1953 ('the Act') also says. Those statutes do not apply to Sarawak, which has its own Limitation Ordinance and which ordinance does not have a provision like s 31 of the Act. Therefore, no assistance can be derived from those authorities when considering the position in Sarawak. The relation back theory advanced by counsel would result in the fifth defendant being a party at the time the writ was commenced on 22 September 1999, when in fact he was not as he was only added on 7 June 2000. Such an argument was decried in *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38 at pp 46–47 where it held that a defendant is only a party after his joinder and that the joinder does not relate back to the date of the writ. I am therefore of the view that the fifth defendant cannot rely on the date the writ was issued as being the date he had commenced his counterclaim since he was only joined as a party on 7 June 2000. This brings me to the next question — was the counterclaim to be regarded as having been commenced on 7 June (when

he was served with the amended writ, making him a defendant to the suit) or 30 June (when he delivered his defence and counterclaim without any claim for slander) or 27 July (when he amended his counterclaim to include slander)? If the 7 June date is to be taken, it would mean that the action of slander having been alleged to have taken place on 15 June would not be time barred. Common sense dictates that the only date that can be reckoned would be the date when the counterclaim came into existence, since only by the counterclaim can the fifth defendant be said to have filed an action against the plaintiff, as otherwise it would amount to saying that the fifth defendant had launched his counterclaim on 7 June when in fact he had not. In the event of an amendment to the counterclaim, the amendment is read back to the date of the counterclaim (*Tilcon Ltd v Land and Real Estate Investments Ltd* [1987] 1 All ER 615 at pp 615 and 618). Therefore, the date of 30 June 2000 is the determining date and this means the action of slander is time barred having been commenced more than one year after the slander was uttered on 15 June 1999. This takes me to the question of whether O 20 r 5 of the Rules of the High Court 1980 permits the inclusion of such a claim though it is time barred.

That order reads:

5 Amendment of writ or pleading with leave (O 20 r 5)

- (1) Subject to O 15 r 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
- (2) Where an application to the court for leave to make the amendment mentioned in paras (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
- (3) An amendment to correct the name of a party may be allowed under para (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under para (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
- (5) An amendment may be allowed under para (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

If the amendment is not allowed, then the striking out would be correct since it is beyond argument that the claim based on slander was time barred.

- A** The proposed amendment was supposedly for the purpose of saving the claim but they are in these terms:
- (i) subsequent to the said speech, the plaintiff published on the plaintiff's intranet website ('the website'), the text of the said speech;
 - (ii) the said speech in the website was published to the plaintiff's staff, servants or agents, including dealers/representatives/ remisiers and all others who have access to the website;
 - (iii) the plaintiff maintained and repeated the publication to all those who have access to the website from the date of its publication to at least August 2000;
 - (iv) fuller particulars of the publication would only be known after discovery.

D The proposed amendment seeks to introduce a new cause of action, which is libel. Therefore, it is an entirely separate cause of action and distinct from that of slander. Therefore, the proposed amendment does nothing to help the cause of action based on slander which is statute barred and therefore correctly struck out.

E As for the new cause of action which the proposed amendment seeks to introduce, it is relevant to determine when the cause of action arose, that is when exactly was this subsequent publication after the slander was uttered on 15 June 1999. The proposed pleading is vague. If one hopes to find the answer in the affidavit supporting the application for amendment, one will also be disappointed as the deponent merely said that it was after the slander. But the proposed pleading did say that the publication continued 'from the date of publication to at least August 2000'. Now, it must be borne in mind that the counterclaim was commenced on 30 June 2000, and therefore it cannot include a cause of action that was not in existence at that time (see *Tilcon Ltd v Land & Real Estate Investments* [1987] 1 All ER 615). The fifth defendant in his affidavit said that he 'personally saw the text of the speech ... sometime in or about 29 August 2000, at the premises of the plaintiff's 'TEXT retrieval system'. That was the publication that was relied on and it clearly occurred after the commencement of the counterclaim and cannot therefore be included in the counterclaim. The deputy registrar was therefore also right in disallowing the application to amend.

G In the premises, the appeals are dismissed with costs to the plaintiff both here and below.

Appeal dismissed with costs to the plaintiff both here and below.

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Reported by Chew Phye Ken

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